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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 437

LAWRENCE ALBERT RAZETE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 398-409) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1952 (R. 397). An order of October 15, 1952, by Mr. Justice Reed, extended the time for filing a petition for certiorari to Novem-

ber 21, 1952. The petition for a writ of certiorari was filed on November 5, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a defendant's conviction under 22 U.S.C. 1584 for making unlawful payments to a government official in connection with the procurement of equipment and services involving Mutual Defense funds was properly upheld where the indictment made no charge of criminal intent, but where the trial court instructed the jury that such a finding was necessary.

2. Whether the evidence to sustain petitioner's conviction under a conspiracy charge was insufficient for absence of proof of his knowledge that Mutual Defense Assistance funds were involved, where the count also alleged conspiracy to defraud the United States and such a conspiracy was proved.

3. Whether the substantive offenses necessarily involved such concert of action as to duplicate the elements involved in the charge of conspiracy.

STATUTES INVOLVED

Act of October 6, 1949, c. 626, Title IV, § 412, 63 Stat. 714, 721, 22 U.S.C., Supp. V, 1584, provides:

> Whoever offers or gives to anyone who is now or in the past two years has been an employee or officer of the United States any com-

mission, payment, or gift, in connection with the procurement of equipment, materials, or services under this Act, and whoever, being or having been an employee or officer of the United States in the past two years, solicits, accepts, or offers to accept any such commission, payment, or gift, shall upon conviction thereof be subject to a fine of not to exceed $10,000 or imprisonment for not to exceed three years, or both.

18 U.S.C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

Petitioner and Kratz were jointly indicted in the United States District Court for the Southern District of Ohio, the first four counts charging Kratz, a contracting officer in the Procurement Di-

vision of Wright-Patterson Air Force Base (R. 24-25), with accepting four payments in connection with the procurement of equipment, materials and services pursuant to certain Air Force contracts, under the Mutual Defense Assistance Act of 1949, 63 Stat. 714, 22 U.S.C. 1571 *et seq.*, in violation of Section 412 [22 U.S.C. 1584] of that act (R. 1-4). Counts 5-8 charged petitioner, who was engaged in the business of repairing and reconditioning electronics equipment (R. 26, 29-30), with making these four payments to Kratz in connection with the same procurements in violation of Section 412 (R. 5-8). Count 9 charged petitioner and Kratz with conspiracy to violate that section and to defraud the United States (R. 8-11).

Before the trial Kratz pleaded guilty and became a prosecution witness (R. 159). Petitioner was found guilty on counts 5-9 (R. 321, 323). He was sentenced to imprisonment for concurrent three-year terms on those counts, and fined $1,000 on count 5 and $500 on each of counts 6-9 (R. 330). On appeal, the judgment was unanimously affirmed (R. 331-333, 397).

The evidence may be summarized briefly as follows:

Petitioner, as president of Raytronic Laboratories, Inc., and general manager of Cincinnati Electronics Company, was engaged in the buying, selling, repairing and manufacturing of radio and electronics equipment (R. 26, 29-30, 353, 359). In

January 1950, at a time when Kratz was being promoted from a buyer to contracting officer at Wright-Patterson Air Base, he was introduced to petitioner by Gooderham, a former contracting officer at Wright Field but then a manufacturer's representative for petitioner. A contracting officer's duty is to procure electronics equipment, radio receivers, and communications equipment for the Air Force and to obligate the government to purchase such equipment from contractors or suppliers. (R. 24-25, 26.) At this first meeting, after a discussion as to the possibility of petitioner's qualifying for Air Force contracts, something was said to the effect that if Kratz could do something for petitioner, petitioner could do something for Kratz (R. 27-28).

Later during January 1950, Kratz and his wife, together with several others, made a combination business and social call at petitioner's plant and home and a combined night club and gambling casino in or near Cincinnati. Again the statement was repeated in substance that if Kratz could do anything for petitioner, the favor would be returned. Kratz promised he would try to get some business for petitioner. (R. 28-29, 31-32.) On August 4, 1950, after Kratz had given a verbal go-ahead so that petitioner could start on a certain contract, petitioner assured Kratz that he would "be rewarded sometime later for [his] help" (R. 51).

Kratz faithfully complied with his promises to procure government contracts for petitioner. Among those contracts he awarded to petitioner's companies were No. 10837 (Ex. 1) for the reconditioning and repair of radio and electronic equipment (R. 15, 34-35, 343-353); No. 15073 (Ex. 2) for the manufacture of radio receivers (R. 15-16, 75, 361-377); and No. 16849 (Ex. 3) for the sale of surplus radio equipment (R. 17, 56-57, 379-389).

In return for the awarding of these contracts, Kratz was paid on one occasion $500 and on another $200, the payments being referred to as "liquor money" (R. 55, 65). Gooderham gave Kratz approximately $200 to pay for a radio, which petitioner had authorized Kratz to choose for himself as a Christmas present (R. 69-72, 391, 393); and later petitioner gave to Kratz another $200 in currency (R. 72-73). Kratz testified that he accepted the cash payments and the radio in connection with the procurement of the contracts which he had awarded to petitioner (R. 76).

The civilian chief of the Foreign Aid Fund at Wright-Patterson Air Force Base, who had charge of the administration of the funds allotted to the Air Force for the procurement of supplies to foreign countries, testified that certain contracts awarded by Kratz to petitioner were partially covered by Mutual Defense Assistance funds. Such funds in the amount of $25,000 were represented in Supplemental Agreement No. 1 to contract No.

10837 (Ex. 1) [R. 18-19, 349, 3in the amount of $750,000 in the letter contrasignated Supplement No. 2 to contract No. 3 (Ex. 2) [R. 19, 367]; and in the amount of 471 in contract No. 16849 (Ex. 3) [R. 19-20, 389]. The testimony of Kratz also disclosed knowledge that the foregoing amounts were Mutual Defense Assistance funds used with relatio the designated contracts (R. 109, 115-117).

In its charge to the jury, trial court instructed *inter alia* that in ordo convict they must find: that petitioner made "alleged payments or gift with a criminar unlawful or felonious intent" (R. 301); thatitioner "knew that Kratz at the time [petition gave Kratz the alleged payments or gift was amployee or officer of the United States" (R.); that the payments or gift were made "in onection with the procurement of equipment, maials or services under the Mutual Defense Assisce Act of 1949" (R. 303). The court further insted that it was not necessary, as to the substive counts, for the Government to prove thatitioner "either intended or knew that any of thcontracts named in the indictment were to be p for in whole or in part out of or by funds provid for by the government under the Mutual Defe Assistance Act of 1949" (R. 302).

ARGUMENT

1. Petitioner's principal contention is that the holding of the court below, that since intent is not a material ingredient of the crime charged under 22 U.S.C. 1584 (*supra*, p. 2) it is not necessary to allege it in the indictment, is contrary to *Morissette* v. *United States*, 342 U. S. 246. It is asserted that there is no clear expression of Congressional purpose to eliminate intent as an ingredient of the crime, and that, if the spirit of *Morissette* is to be adhered to, petitioner's conviction under an indictment not alleging criminal intent will not be permitted to stand. (Pet. 10-11, 16-17).

The decision in *Morissette* involved a reversal because the trial judge failed to give an instruction to the jury requiring a finding of criminal intent on the part of the accused as a prerequisite to his conviction. 342 U. S. at 275-276. Petitioner's argument overlooks the very important fact that, in the instant case, even though the trial judge recognized that the word "intent" was not mentioned in 22 U.S.C. 1584 and in counts 5-8 of the indictment, he did make specific reference thereto in his charge. He instructed that, in order to find petitioner guilty, it would be necessary for the jury to find beyond a reasonable doubt that he gave the "alleged payments or gift with a criminal or unlawful or felonious intent," and followed this with a comprehensive delineation showing the meaning of such intent (R. 300-302). Consequently, the

trial court included in its charge the particular element, the absence of which constituted the basis for the *Morissette* decision.[1] The court below might have rested its decision upon this distinction,[2] but, after a discussion of various aspects of the case, went on to hold that "the indictment was not invalid for lack of charge of the existence of felonious intent, and it was unnecessary for the trial court to charge the jury as to the existence of *mens rea*" (R. 405).

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[1] The court below stated: "The court charged the jury specifically upon the point of guilty knowledge, and the jury found that this existed. If the charge was required it was given; if not the error was in [petitioner's] favor" (R. 401).

[2] Assuming that intent was an element of the offense, the absence of the allegation in the indictment would not be fatally defective in the light of the charge. The indictment was drawn in the language of the statute and fully informed petitioner of the charges against him, which was sufficient. *Hagner* v. *United States*, 285 U. S. 427, 431; *Berger* v. *United States*, 295 U. S. 78, 82.

Petitioner contends (Pet. 6, fn. 3) that the trial court, by overruling his preliminary motion to dismiss the indictment because of failure to allege wrongful intent and by its subsequent instruction to the jury requiring a finding of intent, substantially precluded him from introducing evidence showing lack of wrongful intent. However, the motion to dismiss the indictment (R. 12) did not mention the failure to allege intent. Before petitioner's counsel announced to the court that he would not put on any defense evidence but was resting his case (R. 238), the court had indicated that it would charge the jury on the question of petitioner's intent (R. 209, 210). Petitioner, therefore, had sufficient opportunity to introduce evidence showing absence of criminal intent, had he chosen to do so.

This conclusion is, we submit, correct. t. Congress did not require an allegation of felonious us intent in an indictment under 22 U.S.C. 1 1584, and *Morissette* does not require a holding t that felonious intent is an element of the offens se here involved.[3] This Court in its *Morissette* decision stated that it would not attempt to state t the precise line or "comprehensive criteria for disti inguishing between crimes that require a mental ele lement and crimes that do not" (342 U. S. at 260).

The date of the enactment of this statut te was October 6, 1949, at a time when there was n much publicity concerning Congressional investig gations of influence peddling. In the House deb bate, after reading the amendment in the language e in which it was eventually enacted into law, Co ngressman Vorys stated:

> Mr. Chairman, I would like to c call the attention of the Committee to this an mendment. This is the anti-five percent or anti- deep freeze

[3] Petitioner infers from dictum in *Morissette* that intent may be eliminated as an ingredient of a crime only in cases where the penalty is minor, which was not true of his sentence of three years' imprisonment and a total of $10,000 fine (Pet. 11). However, in *United States* v. *Richerman*, 258 U. S. 280, and *United States* v. *Balint*, 258 U. S. 250, involving violations of Section 2 of the Narcotic Act of December 17, 1914, c. 1, 38 Stat. 786, cited in *Morissette* as examples of acts not requiring felonious intent, the potential penalty, under Section 9 (38 Stat. 789), was a $2,000 fine and imprisonment for not more than five years or both—certainly not a minor penalty.

amendment. I drafted it in rather stringent terms. * * * While this may be a little too strict and while you may need to soften it down a little I hope the committee will accept the amendment.

Mr. Jennings: Why should it not be strict?

The Chairman: The question is on the committee amendment.

The committee amendment was agreed to. [95 Cong. Rec., Part 9, 81st Cong., First Sess., pp. 11801-11802.]

And in the report on the Mutual Defense Assistance Act the amendment embodying 22 U.S.C. 1584 was explained in this manner: "The amendment's purpose is clear—to support integrity of administration in this program." (81st Cong., 1st sess., H. Rep. No. 1265, Pt. 2, p. 36.) Congress considered maintenance of the integrity of the Mutual Defense Assistance program so closely allied with the national security and the public welfare that an express finding of criminal intent was not made an ingredient of the offense in 22 U.S.C. 1584. The mere giving or taking of a gift in connection with public funds was properly considered a detriment to the integrity of the government.

Moreover, at the time of the enactment of the statute in question, Congress was presumably aware of the general bribery statute (18 U.S.C. 201) requiring "intent to influence" and other statutes in the same chapter requiring intent (e.g.,

18 U.S.C. 202, 204, 205, 206, 207, 208, 209, 210). It was also presumably aware of the statutes dealing specifically with payments to United States attorneys and to revenue agents, where specific intent is not required (18 U.S.C. 203, 211). And 18 U.S.C. 216, concerning the payment of money for the procurement of government contracts, contained no provision requiring a specific intent to influence a government official's action. With Congress presumably aware of these statutes, the omission in 22 U.S.C. 1584, of the requirement of criminal intent must, as in the case of 18 U.S.C. 203, 211 and 216, be deemed deliberate and not inadvertent.

2. Petitioner contends that the conspiracy count (number 9) is fatally defective and the evidence in support thereof insufficient because there was no allegation or proof of his knowledge that Mutual Defense Assistance funds were involved (Pet. 17-20).[4] He relies on cases which have held that, although knowledge of the fact that property was stolen from interstate commerce is no part of the offense of receiving such property, a charge of conspiracy to commit such offense must be supported by proof that the conspirators knew or had reason to believe that interstate commerce was involved. *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2) and cases cited.

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[4] Since the prison sentences were concurrent, the contentions relating to the conspiracy count would affect only the $500 fine on that count.

In this case, however, the indictment charged a conspiracy, not only to violate 22 U.S.C. 1584, but also a conspiracy to defraud the United States in regard to a particular contract and to have his co-defendant "so perform the duties of his office as to favor RAZETE in the procuring of United States Government contracts" (R. 9). It was only in connection with the substantive counts 5-8 that the judge charged that petitioner was not required to have knowledge that the contracts involved Mutual Defense Assistance Funds (R. 302-303). As to the conspiracy the judge charged (R. 307):

> * * * If, however, the conspiracy should be established and the evidence shows that the defendants, in this case, had knowledge of it and that it was to violate the provision of the United States Code or carry forward the other charges contained in count 9 in the manner as set forth in the indictment, that they or he contributed thereto or participated intentionally, then such defendant becomes an active person in the conspiracy.

And further (R. 307-308):

> Unless you find that there has been shown beyond a reasonable doubt that there was a conspiracy as charged in the ninth count of the indictment, you need go no further so far as the ninth count of the indictment is concerned, because under such circumstances the

> defendant in this case on trial could not be found guilty on the ninth count. * * *

Since the evidence clearly established that petitioner did conspire with Kratz to defraud the United States, as alleged, it is immaterial whether petitioner did or did not know that the contracts related to Mutual Defense contracts. The offense of conspiracy to defraud was properly alleged and properly proved.

3. With relation to the conspiracy count, petitioner also argues (Pet. 20-24) that the substantive counts necessarily involved concert of action, and hence that there could not be a separate offense of conspiracy. Since, however, as noted above, the conspiracy charged had for its purpose not only the violation of a specific statute, but also the defrauding of the United States, this contention, even if otherwise valid, would have no application because the conspiracy necessarily referred to a separate offense from the substantive crimes. *May* v. *United States,* 175 F. 2d 994, 1003-1004 (C.A. D.C.), certiorari denied, 338 U. S. 830. See *Glasser* v. *United States,* 315 U.S. 60, 66-67, where this Court made it clear that a charge of conspiracy to deprive the United States of its governmental functions by accepting payments to influence action is a different offense from conspiracy to take or give a bribe.

In any event, there is no merit in petitioner's contention even as applied to a conspiracy merely

to commit the substantive count. Petitioner could be guilty under the substantive counts upon a showing that he made payments to Kratz in connection with the procurement of contracts under the Mutual Defense Assistance program, without any prior agreement to do so, and regardless of Kratz' purpose in taking the money. As to the conspiracy count, however, agreement between Kratz and petitioner was the gist of the offense. Thus the offenses are different, both in fact and in law. This Court has held that a charge of conduct unbecoming an officer by accepting money for an official action was so separate from a charge of conspiracy to defraud the United States by giving and receiving money to influence official action that acquittal on the former charge did not bar subsequent trial on the latter. *Bayer* v. *United States,* 331 U. S. 531, 541-543. See also *Fall* v. *United States,* 49 F. 2d 506, 510-511 (C.A. D.C.), certiorari denied, 283 U. S. 867, where a former acquittal of conspiracy was held not to bar a subsequent trial for bribery. Since bribery is an offense both as to giver and the receiver, the *Fall* case disposes of petitioner's attempt to distinguish such cases as *May* v. *United States, supra,* and *Ex parte O'Leary,* 53 F. 2d 956, 957 (C.A. 7), on the ground that the statutes there involved punished only the receiver.[5]

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[5] In *United States* v. *Dietrich,* 126 Fed. 664 (C. C. D. Neb.), on which petitioner strongly relies, the statute made it a criminal offense for a member of Congress to take, receive,

Agreement between giver and receiver is not essential for the offense under 22 U.S.C. 1584. The giver could act in violation of the statute whereas the taker could accept the money under the impression that it was in connection with some matter other than official business. Hence the statute does not preclude a separate charge of conspiracy to commit the offense, and certainly not a charge of conspiracy to defraud.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1952.

"or agree to receive" any money for procuring a government office. Dietrich actually was being charged with conspiring, i.e., illegally agreeing to "agree to receive," and the court decided that he was being charged with a conspiracy to do what the statute said was itself a substantive crime. No such analogous statutory language or situation is involved here, so *Dietrich* is clearly inapplicable.

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DEC 1 1 19

IN THE

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No. 437

October Term, 1952

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

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PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

The Government in its Brief concedes that criminal intent was not alleged in the substantive counts of the indictment (Government's Brief, Page 2). It contends, however, (a) that "criminal intent was not made an ingredient of the offense" (Government's Brief, Page 11) and (b) that even if intent was an element of the offense, the defect of failure to allege intent in the indictment was cured by the charge (Government's Brief, Pages 8 and 9 and Footnote No. 2, Page 9).

1. As to Point (a) this has been fully covered in Petitioner's Brief. The Government contends that Congressional purpose to eliminate intent as an ingredient can be

found from the statement of a single Congressman that the statute should be "strict" (Government's Brief, Page 11). This is carrying construction of a statute from Congressional debates to unheard of limits. It is submitted, however, that even if there was an intention to draft the statute in "stringent terms," that does not indicate an intention to eliminate intent as an ingredient of the crime. Instead, it points to the seriousness of the crime and if any inference is to be drawn from that, it would be that Congress was considering a crime in its ordinary aspects. That would require inclusion of an evil intent as an element of the crime.

With respect to Point (b), the argument that the Court's charge would cure the defect disregards the host of cases which hold that where intent is an essential ingredient of the offense, the indictment is defective even after verdict unless intent is averred. *United States* v. *Staats*, 8 Howard 41, 44; *United States* v. *Cruikshank*, 92 U. S. 542, 558; *Evans* v. *United States*, 153 U. S. 584; 594. The very case cited by the Government in its footnote 2, *Hagner* v. *United States*, 285 U. S. 427, holds at Page 433:

> "It is not the intent of Section 1025 to dispense with the rule which requires that the essential elements of an offense must be alleged."

The Court's charge that intent was an ingredient of the crime and the Solicitor General's contrary view indicates the doubt which exists as to proper construction of the statute. If any consideration is to be given to the Court's charge, that can only be as an emphasis to the Petitioner's position that intent is an element of the crime. If it was necessary to charge the jury on criminal intent, it was necessary to allege it in the indictment. A failure of such allegation in the indictment renders the indictment fatally defective.

2. With respect to the conspiracy count, the Government again concedes the evidential point on which the Petitioner's position is predicated, namely, that he had no knowledge that Mutual Defense Assistance Funds were involved (Government's Brief, Page 2). Apparently the Government has no answer to Petitioner's position in this respect insofar as the first portion of the conspiracy count is concerned. It predicates its entire argument on the allegation in the Ninth Count in regard to a conspiracy to defraud the United States in respect to a particular contract and the allegation of an alleged conspiracy to cause Kratz to favor Razete in the procurement of Government contracts.

The facts are that there was no proof with respect to those phases of the conspiracy count and the verdict on the conspiracy count can only be predicated on the first portion of that count. There was no agreement by Razete and Kratz on the subject matter.

The Government says (Government's Brief, Page 5) that at the first meeting of Razete and Kratz "something was said to the effect that if Kratz would do something for Petitioner, Petitioner would do something for Kratz."

The Government fails to point out that Kratz, who was the only witness who testified on this point, stated:

> "I am not at all certain who made that statement, whether Mr. Razete made that or Mr. Gooderham or whether Mr. Sianas made that" (R. 28).

Mr. Sianas was also a Government contracting officer and was Kratz's superior (R. 27). Certainly Razete should not be charged on testimony of this nature where the statement is never brought home to him. The Government again declares that the statement was repeated "in substance that if Kratz would do anything for Petitioner, the favor would be returned" (Government's Brief, Page 5). Again, the Government fails to call attention to the fact that

Kratz testified "I don't recall just who said that. I can't fix any name definitely on that" (R. 31).

3. It should be borne in mind that insofar as the Ninth Count dealt with an "alleged conspiracy to defraud the United States," it dealt with such conspiracy "in regard to a particular contract" (Government's Brief, Page 13). The facts in the record as to that particular contract are that Razete sometime prior to August 31, 1950, made a bid to supply certain Air Force Receivers. This was to be a negotiated contract, but later it was decided by the Air Force (without the participation of either Kratz or Razete in the decision) that the procurement would be made by competitive bidding (R. 52-54). Razete's bid in the competition was higher than the price he originally quoted on the negotiated contract. The rising costs in 1950 easily explain this. In any event the indictment only alleges that Kratz agreed to "accept such price if possible" (R. 9). Since the contract was awarded on competitive bids, it was only possible for the award to go to Razete if he was the lowest bidder. The transaction on which the second portion of the Ninth Count is predicated is shown by the record to have been a typical competitive bid award, free from any remote suggestion of fraud.

4. The Government's position really reduces itself to the following. It fails to answer Petitioner's argument with respect to the substantive counts and it fails to answer the Petitioner's contention with respect to that portion of the conspiracy count which charges Razete and Kratz with conspiring to violate Section 1584. It seeks to justify the verdict primarily on the fact that sentence was imposed to run concurrently on all counts. However, we have here a situation where four of the five counts are seriously questioned and where the challenge is not answered by the Government. With respect to the conspiracy count, we

again have a very serious challenge as to the charge of conspiring to violate Section 1584—a challenge which is not answered by the Government. Instead, the Government attempts to sustain the conviction on the basis of a minor portion of the conspiracy count, but that portion required proof of an agreement which the Government's witness specifically stated he could not attribute to Razete.

The attempt of the Government to justify the conviction on this fragmentary and unproved portion of the indictment lends further basis for granting of the petition for writ of certiorari. To justify the verdict in this manner is to depart so shockingly from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. If the indictment had eliminated the substantive counts and the first portion of the Ninth Count, and Razete had been tried only on the charge of conspiring to defraud the Government, the jury's attention would have been focused on Kratz's declarations that he could not state who made the statements on the basis of which the Government now contends there was an agreement to defraud. Certainly, it can be questioned whether a trial on this phase of the case, divorced from all other matters, would have resulted in a conviction. If the Courts below were wrong on the substantive counts and with respect to the first portion of the conspiracy count, then the statement of this Court in *Kotteakos* v. *United States*, 328 U. S. 750, is in point.

> "If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error

> itself had substantial influence. If so, or if one is left with grave doubt, the conviction cannot stand" (328 U. S. 765).

The Government, here, seems to contend in its argument with respect to the Ninth Count, that the substantive counts can be eliminated and that even one or more of the branches of the Ninth Count can be eliminated and yet the conviction can still be sustained. We submit that the entire indictment is faulty as to all of the counts, but certainly the Government's position cannot be maintained in the light of the previous quotation. In such a situation, the Defendant has not received a fair trial. As pointed out by the Supreme Court in the *Kotteakos* case

> "Obviously, the burden of defense to the defendant connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate" (28 U. S. 766).

CONCLUSION

It is respectfully submitted that the Petion for Writ of Certiorari should be granted.

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Counsel for Petitioner.